



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO 91 of 2019

KEVIN MORIASI ONDIEKI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. R.M Oanda PM dated 25th October, 2017 at the Principal Magistrate's Court at Kilgoris in Sexual Offence Case No. 3 of 2017)

JUDGEMENT

1. The appellant was charged with defilement contrary to **Section 8(1) as read with subsection 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 24th December 2016 in Transmara West District within Narok County, intentionally caused his penis to penetrate the vagina of VNM a child aged 15 years.
2. He faced an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 24th December 2016 at [particulars withheld] area, in Transmara West District within Narok County, intentionally touched the vagina of VNM a child aged 15 years.
3. He was also charged with a second count of child trafficking contrary to section **14(a) of the Sexual Offences Act No 3 of 2006**. The particulars being that on 1st January 2017 in Transmara West District within Narok County, knowingly and intentionally took VNM aged 15 years out of the custody of her parents from [particulars withheld] village to Kilgoris town about 50 kilometers away with the intent of facilitating the commission of any sexual offences against VNM.
4. The subordinate court found the appellant guilty in respect to count I and sentenced him to 10 years imprisonment. The appellant aggrieved by the conviction and sentence, has now lodged this appeal on grounds that the prosecution did not prove its case to the required standards, that is, beyond reasonable doubt. The appellant also challenged the 10 year sentence meted out by the trial court.
5. The appellant filed his written submissions on 2nd September 2020 while Mr. Otieno, state counsel for the prosecution made oral submissions.
6. The appellant submitted that a torn or broken hymen alone is not conclusive proof of penetration and relied on the cases of **David Mwingirwa v Republic [2017] eKLR** and **PKW v Republic [2012] eKLR**. The appellant argued that the alleged defilement occurred on 24th December 2016 but the complaint was made on 5th January 2017. According to the doctors report the labia minora and majora were normal. The hymen was not freshly broken. It was submitted that the medical officer indicated that the complainant was sexually active and ended up contracting a sexually transmitted disease (syphilis) while the applicant's examination did not reveal that he suffered from any sexually transmitted infection. They contend that the evidence on identification was not sufficient as the prosecution failed to call the witness who was allegedly at the scene. The appellant argued that the trial court failed to record whether he believed the complainant's testimony neither did he record any reasons as required under **section 124 of the Evidence Act**.
7. Mr. Otieno conceded the appeal arguing that the evidence solely fell on the complainant who testified that she was defiled on 24th December 2016. The medical examination done 2 weeks after the incident indicates that the complainant was sexually active. He submitted that since the magistrate relied on Pw1's testimony, he should have recorded why he believed the complainant. The prosecution urged the court to consider the age of the accused at the time of the offence was 19 years and that he was in a relationship with the complainant.
8. This is a first appellate court and I bear the onerous duty to re-evaluate the evidence adduced at trial and reach my own independent conclusion all the while alive to the fact that I never saw or heard the witnesses testify and give due allowance in that regard. That duty was well enunciated in the case of **Okeno -vs- R [1972]EA 32** where at page 36 the court stated;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- R [1975] E.A 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –vs- Sunday Post (1958)E.A 424.”

9. The ingredients that must be established for proof of the offence of defilement are threefold: first the prosecution must demonstrate that the appellant caused the act of penetration; secondly the appellant must be positively identified as the perpetrator of the hideous crime; and finally the complainant must be a child within the meaning of **section 2** of the **Children’s Act**.

10. In order to prove the aspect of penetration the prosecution relied on the evidence of VNM (Pw1). She recalled that on 24th December 2016 after attending church she met the accused next to the tank near the kitchen. They proceeded to the dormitory where they had sex. She testified that;

“He wanted me to have sex with him. We had sex for five minutes. I later joined Faith and the other friend and we went to the church. This was my first time I had sex. I experienced pain. I told Rebecca about this. She later informed mum about it. Mum inquired about it from me on 1/1/2017. She also reported this to my father and I was beaten up.”

11. JM (Pw2) told court that the complainant who was his daughter disappeared from home on 1/1/2017 and was found by a ‘good Samaritan’ who helped her get home. Sergeant Salome Mining (Pw3) testified that Pw2 reported that Pw1 had eloped with the appellant. The following day the complainant was found along [particulars withheld] road and interrogated. Both the complainant and the appellant were taken to hospital for medical examination.

12. Festus Kurgat (Pw4), the clinical officer at Transmara West District Hospital, testified that upon examination of Pw1, it was discovered that she had a whitish discharge and further lab investigations revealed that she had a venereal disease. It was also noted that the hymen was also broken. The appellant was equally examined and was found not to have syphilis.

13. The evidence by Pw1 was clear that she had engaged in a sexual activity with the appellant. The medical evidence further corroborated the testimony of Pw1. Pw4 testified that the hymen was not freshly broken and this is consistent with the fact that the complainant had sexual intercourse with the appellant 12 days before the medical examination.

14. The appellant in his submissions argued that penetration was not proved to the required standard by virtue that he did not have syphilis while medical report indicated that the complainant had contracted the said venereal disease. In my view, the prosecution is only tasked to prove the element of penetration and not how the complainant contracted the sexually transmitted disease.

15. The appellant also contend that the prosecution failed to call a key witness, ‘Rebecca’, who was present when the complainant and the appellant met on the material day. *As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive (see Julius Kalewa Mutunga vs Republic [2006] eKLR, CRIMINAL APPEAL NO. 31 OF 2005).*

16. This case concerns an offence relating to *sexual assault and the proviso of Section 124 of the Evidence Act establishes that where the sole witness is the alleged victim, then her evidence alone is sufficient support a conviction without the need of corroboration if, for reasons to be recorded, the trial magistrate believes the child is telling the truth. In this case the trial magistrate having considered the evidence by Pw1 did not give reasons why he considered that Pw1 was telling the truth. Both the appellant and prosecution contend that this omission was fatal. In M M v Republic [2019] eKLR the Court of Appeal held that;*

“In the case before the trial magistrate, the victim of the sexual offence was eight (8) yrs old. The victim was a child of tender years as defined in law. The trial magistrate did not record any reason why the evidence of the child victim was believed. The High Court acknowledges in its Judgment that the trial magistrate made an error in law in not recording reasons for believing the testimony of the child of tender years but the High Court did not correct that error. The High Court was legally and duty bound to re-evaluate the evidence and come to its own conclusion. The High Court here re-evaluated the evidence, found an error of law in the way the trial magistrate had dealt with an important issue where there was reliance on the evidence of a single witness but did not correct it. It would be remiss of us and against our mandate to let such an error stand. It was an error of law and the conviction entered was unlawful in that the law required the trial magistrate to record in the proceedings, reasons why he had believed the testimony of the single witness who was the victim of a sexual offence. The High Court re-evaluated the evidence and made a direct finding that the trial magistrate had erred in law in failing to abide by the requirements of Section 124 of the Evidence Act. The High Court was duty bound to correct the error by the trial magistrate but did not do so. That was an error of law and should not be allowed to stand. The conviction of the appellant for the offence of defilement is hereby quashed and the sentence imposed is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.”

17. In **Naomi Bonareri Angasa v Republic [2018] eKLR** the court stated that;

“The testimony of the child does not require corroboration under the proviso section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya). It is complete and can support a conviction if, for reasons to be recorded the trial magistrate believes the child is telling the truth. In this instance, the magistrate who wrote the judgment is not the one who heard testimony of PW 1 hence she could not comment on his demeanour but this is not the requirement of the law that the demeanour is the only way to ascertain whether the child is telling the truth. The court is entitled to look at the record, the veracity and consistency of the testimony both in examination in chief and in cross-examination and the surrounding circumstances in order to be satisfied that the child is telling the truth. In this case the trial magistrate held that the child was intelligent, gave consistent evidence and had no reason to frame the appellant.”

18. The failure by the trial court to record reasons why it considered that PW 1 was telling the truth is fatal to the prosecution case noting the legal requirement set by the Court of Appeal in *MM v Republic [2019]eKLR* and in *Naomi Bonareri Angasa v Republic [2018] eKLR*.

19. Secondly, the complainant testified that Rebecca was the first person she told about the incident and it is Rebecca who reported the matter to the complainant's mother. For unexplained reasons Rebecca was not called as a witness. Whereas the calling of any witness is at the discretion of the court, the omission of Rebecca as a witness in these proceedings raises serious concerns.

20. PW 1 was found to have contracted syphilis. The appellant did not have syphilis. This too raises some doubts about whether the appellant had sex with the complainant.

21. In view of the foregoing, my finding is that the conviction of the appellant was not based on cogent evidence and was therefore unsafe.

The appeal herein has merit and I allow it in its entirety. The appellant is forthwith set at liberty unless otherwise lawfully held.

Dated and Delivered at KISII this 14th day of October, 2020

A. K. NDUNG'U

JUDGE